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# Duke University v. St. Paul Fire & Marine Insurance Co.: The Court of Appeals Brings Ambiguity to the Interpretation of Professional Services

Samuel M. Taylor

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## ***Duke University v. St. Paul Fire & Marine Insurance Co.:* The Court of Appeals Brings Ambiguity to the Interpretation of "Professional Services"**

The extraordinary development of insurance, and its necessary adaptation to the varying and complicated business relations of a progressive age tax the utmost ability of the courts. . . . While we should protect the companies against all unjust claims and enforce all reasonable regulations necessary for their protection, we must not forget that the primary object of all insurance *is to insure*. . . . We can not permit insurance companies by unreasonable stipulations to evade the payment of such indemnity when justly due, and thus defeat the very object of their existence.<sup>1</sup>

Over ninety years ago, the North Carolina Supreme Court, revealing more than a hint of consternation about the increasing complexity of insurance contracts, joined other American jurisdictions in concluding that ambiguous clauses in contracts of insurance should be interpreted in favor of the insured. This canon of construction, which since has proved inherently flexible in both application and outcome,<sup>2</sup> has become a favorite of modern jurists dealing in the complex and technical language of insurance contracts.<sup>3</sup>

Most recently, the North Carolina Court of Appeals applied the doctrine of strict construction in *Duke University v. St. Paul Fire & Marine Insurance Co.*<sup>4</sup> to give narrow interpretation to a "professional services" exclusion in the general liability insurance policy of a North Carolina hospital.<sup>5</sup> This ruling places North Carolina among a growing number of states giving narrow construction to "professional services" exclusions.<sup>6</sup> This Note analyzes the court's holding in *Duke University* and concludes that while the strict construction of professional services exclusions is consistent with North Carolina courts' long term deference to policyholders, the court's rationale creates a confusing area of overlap between general liability insurance policies and professional service insurance policies. The Note suggests that the court could have minimized this overlap by

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1. *Grabbs v. Farmers' Mut. Fire Ins. Ass'n*, 125 N.C. 389, 399, 34 S.E. 503, 506 (1899).

2. See *infra* notes 41-61 and accompanying text.

3. 2 M. RHODES, *COUCH CYCLOPEDIA OF INSURANCE LAW* § 15:74, at 334, 341 (rev. 2d ed. 1984). "The words, 'the contract is to be construed against the insurer' comprise the most familiar expression in the reports of insurance cases." *Id.* at 334. For a list of cases applying the rule that ambiguous language is to be construed against the insurer, see *id.* at 341 n.10.

4. 96 N.C. App. 635, 386 S.E.2d 762, *disc. rev. denied*, 326 N.C. 595, 393 S.E.2d 876 (1990).

5. *Id.* at 641, 386 S.E.2d at 766.

6. See, e.g., *Gulf Ins. Co. v. Gold Cross Ambulance Serv. Co.*, 327 F. Supp. 149, 154-55 (W.D. Okla. 1971); *Keepes v. Doctors Convalescent Center, Inc.*, 89 Ill. App. 2d 36, 40, 231 N.E.2d 274, 276 (1967); *American Casualty Co. v. Hartford Ins. Co.*, 479 So. 2d 577, 579 (La. App. 1985); *D'Antoni v. Sara Mayo Hosp.*, 144 So. 2d 643, 646-47 (La. App. 1962); *Lady Beautiful, Inc. v. Zurich Ins. Co.*, 16 Ohio Misc. 169, 172, 240 N.E.2d 894, 896 (1968). But see *Ocean Accident & Guarantee Corp. v. Herzberg's Inc.*, 100 F.2d 171, 173 (8th Cir. 1938), *cert. denied*, 306 U.S. 645 (1939); *Antles v. Aetna Casualty & Sur. Co.*, 221 Cal. App. 2d 438, 443, 34 Cal. Rptr. 508, 511 (1963); *Brockbank v. Travelers Ins. Co.*, 12 A.D.2d 691, 691, 207 N.Y.S.2d 723, 724 (1960), *appeal denied*, 9 N.Y.2d 609, 172 N.E.2d 293, 210 N.Y.S.2d 1025 (1961); *Harris v. Fireman's Fund Indem. Co.*, 42 Wash. 2d 655, 660-61, 257 P.2d 221, 227 (1953).

considering the intent of the contracting parties and the economic considerations driving insurance contracts. In particular, the Note submits that a proper analysis would have considered that insurance policies are designed to classify insureds according to commonality of risk, and that these classifications, when successfully applied, serve the important public policy goal of placing the burden of insuring a particular type of risk on those persons most able to protect against it.

At issue in *Duke University* was a general liability insurance policy insuring Duke University and Duke University Medical Center against claims of injury arising from accidents on their premises.<sup>7</sup> The policy specifically excluded "claims arising out of the providing or failure to provide professional services" in hospital operations.<sup>8</sup> In June of 1986, an elderly patient at the Medical Center's outpatient dialysis center was injured when attendants failed to stabilize her dialysis chair as she attempted to rise after treatment.<sup>9</sup> The patient later died from injuries sustained in the fall and a wrongful death action ensued.<sup>10</sup> St. Paul Fire and Marine Insurance Company, the underwriter of the university's general liability policy, refused to defend the wrongful death action on grounds that the claim was within the policy's professional services exclusion.<sup>11</sup> Following settlement of the parent action, the university brought suit against the insurer to recover its costs.<sup>12</sup> The trial court ordered summary judgment for the university and the insurer appealed.<sup>13</sup> The court of appeals unanimously affirmed.<sup>14</sup>

The interpretation of professional services exclusions in insurance policies was an issue of first impression for North Carolina appellate courts.<sup>15</sup> The court of appeals thus began its analysis of the exclusion clause by briefly reviewing North Carolina's well-settled rules of construction for contracts of insurance. Specifically, the court noted that "[p]rovisions which exclude liability coverage are not favored . . . and any ambiguities must be construed against the insurer and in favor of the insured."<sup>16</sup>

After quickly concluding that the claim at issue could not be excluded on causal grounds alone,<sup>17</sup> the court turned to the task of construing the term "pro-

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7. *Duke University*, 96 N.C. App. at 636, 386 S.E.2d at 763; see Record at 21, *Duke University* (No. 8914SC33).

8. *Duke University*, 96 N.C. App. at 637, 386 S.E.2d at 764; Record at 29.

9. *Duke University*, 96 N.C. App. at 638, 386 S.E.2d at 764.

10. *Id.* at 636, 638, 386 S.E.2d at 763, 764; see Record at 4.

11. *Duke University*, 96 N.C. App. at 636, 386 S.E.2d at 763.

12. *Id.*

13. *Id.*

14. *Id.* at 641, 386 S.E.2d at 766.

15. *Id.* at 638, 386 S.E.2d at 764.

16. *Id.*

17. See *id.* at 638-39, 386 S.E.2d at 764. The exclusion clause provided that claims "arising out of" professional services should be excluded. *Id.* at 638, 386 S.E.2d at 764. The court noted that the "arising out of language" must be construed narrowly "to require that the excluded cause be the sole proximate cause of the injury." *Id.* at 638-39, 386 S.E.2d at 764 (citing *State Capital Ins. Co. v. Nationwide Mut. Ins. Co.*, 318 N.C. 534, 547, 350 S.E.2d 66, 74 (1986)). Thus the court held: "[C]overage [in this case] is excluded only if any negligence with respect to assisting decedent out of

essional services." Two principles guided its inquiry. First, the court noted that "a 'professional service' generally is defined as one arising out of a vocation or occupation involving specialized knowledge or skills, and the skills are mental as opposed to manual."<sup>18</sup> Second, the court observed, acts or omissions should be classified as professional services on the basis of the nature of the acts or omissions themselves, rather than the "position of the person responsible for the act or omission."<sup>19</sup> Applying these postulates and the rule that courts should construe ambiguous policy exclusions in favor of the insured, the court concluded that the actions at issue in *Duke University* could not be classified as professional services for policy exclusion purposes.<sup>20</sup> Professional service policy exclusions, the court held, apply "only [to] those services for which professional training is a prerequisite to performance."<sup>21</sup> Stabilizing the dialysis chair and assisting the injured party required no special skill or training and thus could not be viewed as falling within the professional services exclusion.<sup>22</sup>

The court was not persuaded by authorities from other jurisdictions that had given professional service exclusions broader sweep.<sup>23</sup> Jurisdictions that had so ruled, the court noted, "did not employ the strict rule of construction against the insurer that we must follow in this case."<sup>24</sup> Further, the court held that while its interpretation of the exclusion language implied that the same claim might be insured under both professional malpractice policies and general liability policies with professional service exclusions, this potential for overlapping coverage would not affect its decision.<sup>25</sup>

The notion that insurance policy exclusions should be disfavored and narrowly construed against the insurer is but one element in a group of constructional principles North Carolina courts apply when interpreting contracts of

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the chair was a providing [sic] or failure to provide professional services. In order to resolve this issue, we must construe the term 'professional services.' " *Id.* at 639, 386 S.E.2d at 764.

18. *Id.* at 639, 386 S.E.2d at 765 (citing *Smith v. Keator*, 21 N.C. App. 102, 105-06, 203 S.E.2d 411, 415, *aff'd*, 285 N.C. 530, 206 S.E.2d 203, *appeal dismissed*, 419 U.S. 1043 (1974)); *see infra* notes 74-80 and accompanying text.

19. *Duke University*, 96 N.C. App. at 639, 386 S.E.2d at 765 (citing *Gulf Ins. Co. v. Gold Cross Ambulance Serv. Co.*, 327 F. Supp. 149, 152 (W.D. Okla. 1971)); *see infra* notes 88-89 and accompanying text.

20. *Duke University*, 96 N.C. App. at 641, 386 S.E.2d at 766.

21. *Id.*

22. *Id.* Further, the court concluded that:

"[a]lthough the dialysis chair was a specialized piece of equipment, the injury was not related to any special function of the chair but merely resulted from the presence of casters on the chair which enable it to be easily moved. . . . [N]o special training is required for a person to know that a chair with casters may move when someone attempts to rise from it."

*Id.*

23. *See supra* note 6.

24. *Duke University*, 96 N.C. App. at 640, 386 S.E.2d at 765. Presumably the court was referring to the rule that "provisions which exclude liability coverage are not favored," *id.* at 638, 386 S.E.2d at 764, since virtually all jurisdictions employ the general rule of construction against the insurer. *See supra* note 3. Even the rule disfavoring exclusions may not distinguish adequately many of the holdings in jurisdictions that give broader interpretation to the exclusion language. *See infra* note 37.

25. *Duke University*, 96 N.C. App. at 640, 386 S.E.2d at 765. The court did not explain this conclusion.

insurance. The North Carolina Supreme Court, in *Maddox v. Colonial Life & Accident Insurance Co.*, summed up these constructional rules:<sup>26</sup>

In interpreting the relevant provisions of [insurance policies], we are guided by the general rule that in the construction of insurance contracts, any ambiguity in the meaning of a particular provision will be resolved in favor of the insured and against the insurance company. Exclusions from and exceptions to undertakings by the company are not favored, and are to be strictly construed to provide the coverage which would otherwise be afforded by the policy. The various clauses are to be harmoniously construed, if possible, and every provision given effect. An ambiguity exists where, in the opinion of the court, the language of the policy is fairly and reasonably susceptible to either of the constructions asserted by the parties.<sup>27</sup>

Three principles underlie this aggregated rule of construction. First, in construing ambiguous policy provisions, courts must favor the insured.<sup>28</sup> Second, absent ambiguity, courts must construe an insurance policy in accordance with its express terms.<sup>29</sup> Finally, ambiguous terms must be construed in harmony with the express provisions of the policy.<sup>30</sup>

Although frequently applied mechanically by modern courts,<sup>31</sup> there are important theoretical underpinnings for the rule that insurance policies should be construed in favor of the insured. As the quotation that opens this Note suggests, North Carolina courts struggling with the rapid development of new forms of insurance during the early twentieth century sought to protect relatively unschooled laypersons ill-equipped to analyze and interpret their policies.<sup>32</sup> Although this rule is similar to the admonition *contra proferentem*,<sup>33</sup> it has independent policy justifications. As one court has pointed out, "[insurance policies] are unipartite. . . . In general, the insured never sees the policy until after he contracts and pays his premium, and he then most frequently receives it from a distance, when it is too late for him to obtain explanations or

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26. 303 N.C. 648, 280 S.E.2d 907 (1981) (six of seven justices concurring in the result but not in the opinion), quoted with approval in *Nationwide Mut. Fire Ins. Co. v. Allen*, 68 N.C. App. 184, 188, 314 S.E.2d 552, 554-55, disc. rev. denied, 311 N.C. 761, 321 S.E.2d 142 (1984).

27. *Maddox*, 303 N.C. at 650, 280 S.E.2d at 908 (citations omitted).

28. See *infra* notes 31-40 and accompanying text.

29. See *infra* notes 41-61 and accompanying text.

30. See *infra* notes 62-73 and accompanying text.

31. See, e.g., *State Capital Ins. Co. v. Nationwide Mut. Ins. Co.* 318 N.C. 534, 541, 547, 350 S.E.2d 66, 70, 73-74 (1986); *Waste Management, Inc. v. Peerless Ins. Co.*, 315 N.C. 688, 693-94, 340 S.E.2d 374, 378-79 (1986); *Maddox v. Colonial Life & Accident Ins. Co.*, 303 N.C. 648, 653-54, 280 S.E.2d 907, 910 (1981).

32. See, e.g., *Roberts v. American Alliance Ins. Co.*, 212 N.C. 1, 4, 192 S.E. 873, 875 (1937); *East Carolina Ry. v. Maryland Casualty Co.*, 145 N.C. 114, 117, 58 S.E. 906, 907 (1907) (quoting *Bray v. Virginia Fire & Marine Ins. Co.*, 139 N.C. 390, 393, 51 S.E. 922, 923 (1905)).

33. See 2 M. RHODES, *supra* note 3, § 15:74, at 334, 341. The constructional principle of *contra proferentem* suggests that "if language supplied by one party is reasonably susceptible to two interpretations, one of which favors each party, the one that is less favorable to the party that supplied the language is preferred." E. FARNSWORTH, *CONTRACTS* § 7.11, at 518 (2d ed. 1990). The rule frequently is applied in the construction of standard contracts and "often operates against a party that is at a distinct advantage in bargaining." *Id.*

modifications."<sup>34</sup>

In contrast to the clearly articulated considerations supporting the general rule of construction in favor of insureds, North Carolina courts adopted the principle that exclusions are disfavored and thus strictly construed against the insurer with virtually no independent explanation. The exclusion rule first was applied in North Carolina in *Allstate Insurance Co. v. Shelby Mutual Insurance Co.*<sup>35</sup> in 1967. Justice Lake, who wrote frequently for the court regarding insurance matters, stated simply that "[e]xclusions from and exceptions to undertakings by the company are not favored."<sup>36</sup> Presumably, the court considered this unexplained statement an obvious corollary to the general rule that courts should construe ambiguities in policies of insurance in favor of the insured. Since exclusions by their very nature must diminish coverage, and hence disfavor the insured, any ambiguity in such clauses necessarily would cause a court to construe the limiting language narrowly.<sup>37</sup> Additionally, the *Allstate* court may well have concluded that policyholders unfamiliar with the structure and terminology of insurance documents might overlook or misunderstand exclusion clauses, and that disfavoring these exclusions would protect unsuspecting insurance purchasers.<sup>38</sup> Whatever rationale prompted the rule, it has found wide

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34. *Roberts*, 212 N.C. at 4, 192 S.E. at 875.

35. 269 N.C. 341, 152 S.E.2d 436 (1967).

36. *Id.* at 346, 152 S.E.2d at 440. Nor do the authorities cited for the proposition explain why exclusions should be disfavored beyond any other language purporting to define the nature and extent of coverage. See *Jamestown Mut. Ins. Co. v. Nationwide Mut. Ins. Co.*, 266 N.C. 430, 435, 146 S.E.2d 410, 414 (1966); *Anderson v. Allstate Ins. Co.*, 266 N.C. 309, 312, 145 S.E.2d 845, 848 (1966).

Whatever the reasons for disfavoring exclusions, courts have held that the burden of proving facts within an exclusion rests with the insurer. See, e.g., *Brevard v. State Farm Mut. Auto. Ins. Co.*, 262 N.C. 458, 461, 137 S.E.2d 837, 839 (1964) ("In an action to recover under an insurance policy, the burden is on the plaintiff to allege and prove coverage. On the other hand, the burden of showing an exclusion from coverage in [sic] on the insurer."); *Barclays American/Leasing, Inc. v. North Carolina Ins. Guar. Ass'n*, 99 N.C. App. 290, 294, 392 S.E.2d 772, 774 (1990); *Reliance Ins. Co. v. Morrison*, 59 N.C. App. 524, 525, 297 S.E.2d 187, 188 (1982).

37. 2 M. RHODES, *supra* note 3, states simply: "In accord with general principles, policy exceptions are strictly construed and do not reduce the coverage beyond their express terms. . . . [A]ny ambiguity in an exception clause is construed in favor of the insured." 2 M. RHODES, *supra* note 3, § 44A:3, at 7.

If this is the only theoretical justification for North Carolina courts' disfavoring of exclusions, then it would seem there is really *no* reason to disfavor such clauses more than any other limitation in coverage. If so, the *Duke University* court's attempt to distinguish jurisdictions that have construed exclusions more broadly is seriously flawed. See *Duke University*, 96 N.C. App. at 639-40, 386 S.E.2d at 765; *supra* note 24 and accompanying text. Each of the conflicting jurisdictions cited by the court has well-developed rules requiring strict construction of ambiguous policy limitations. See *New York Life Ins. Co. v. Hollender*, 38 Cal. 2d 73, 81, 237 P.2d 510, 514 (1951); *Tonkin v. California Ins. Co.*, 294 N.Y. 326, 328-29, 62 N.E.2d 215, 216 (1945); *Jack v. Standard Marine Ins. Co.*, 33 Wash. 2d 265, 271, 205 P.2d 351, 354 (1949) (quoting *Guaranty Trust Co. v. Continental Life Ins. Co.*, 159 Wash. 683, 688, 294 P. 585, 587 (1930)).

38. This supposition is supported by rather colorful language used by Justice Lake in *Jamestown Mut. Ins. Co. v. Nationwide Mut. Ins. Co.*, 266 N.C. 430, 146 S.E.2d 410 (1966):

When an insurance company, in drafting its policy of insurance, uses a "slippery" word to mark out and designate those who are insured by the policy, it is not the function of the court to sprinkle sand upon the ice by strict construction of the term. All who may, by any reasonable construction of the word, be included within the coverage afforded by the policy should be given its protection. If, in the application of this principle of construction, the limits of coverage slide across the slippery area and the company falls into a

application in recent North Carolina insurance holdings.<sup>39</sup> Like the general principle of strict construction, however, North Carolina courts employ the doctrine quite mechanically, with little if any consideration for its theoretical basis.<sup>40</sup>

Before a court is permitted to apply any of the rules of strict construction outlined above, it first must find a provision ambiguous.<sup>41</sup> The presence of ambiguity is a determination for the court.<sup>42</sup> In cases involving exclusion clauses, courts have found ambiguity in policy provisions that are substantially contradictory,<sup>43</sup> as well as in provisions that are susceptible to more than one interpretation.<sup>44</sup> In the case of contradictory provisions, courts generally have denied effect to exclusionary language.<sup>45</sup> Clauses susceptible to multiple interpretations, however, have presented a host of difficult cases in which courts have acted largely on the equities of particular situations. In *York Industrial Center, Inc. v. Michigan Mutual Liability Co.*,<sup>46</sup> for example, the court held that an insurance policy that specifically exempted intentional destruction covered liability in trespass incurred by a developer who cleared erroneously surveyed property.<sup>47</sup> The court concluded that although trespass, by definition, requires

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coverage somewhat more extensive than it contemplated, the fault lies in its own selection of the words by which it chose to be bound.

*Id.* at 437, 146 S.E.2d at 416.

39. *E.g.*, *State Capital Ins. Co. v. Nationwide Mut. Ins. Co.*, 318 N.C. 534, 542-43, 350 S.E.2d 66, 71 (1986); *Maddox v. Colonial Life and Accident Ins. Co.*, 303 N.C. 648, 650, 280 S.E.2d 907, 908 (1981); *Wilkins v. American Motorists Ins. Co.*, 97 N.C. App. 266, 270, 388 S.E.2d 191, 193 (1990); *W & J Rives, Inc. v. Kemper Ins. Group*, 92 N.C. App. 313, 317, 374 S.E.2d 430, 433 (1988), *disc. rev. denied*, 324 N.C. 342, 378 S.E.2d 809 (1989); *Western World Ins. Co. v. Carrington*, 90 N.C. App. 520, 523, 369 S.E.2d 128, 129 (1988); *Graham v. James F. Jackson Assocs., Inc.*, 84 N.C. App. 427, 430, 352 S.E.2d 878, 881, *disc. rev. granted*, 319 N.C. 458, 356 S.E.2d 4, *disc. rev. withdrawn*, 321 N.C. 295, 362 S.E.2d 277 (1987).

40. *See supra* note 39.

41. *Wachovia Bank & Trust Co. v. Westchester Fire Ins. Co.*, 276 N.C. 348, 354, 172 S.E.2d 518, 522 (1970). If there is no ambiguity, "the court must enforce the contract as the parties have made it and may not, under the guise of interpreting an ambiguous provision, remake the contract and impose liability upon the company which it did not assume and for which the policyholder did not pay." *Id.* For two recent cases that follow this rule, see *Wilkins*, 97 N.C. App. at 272, 388 S.E.2d at 195 and *Mastrom, Inc. v. Continental Casualty Co.*, 78 N.C. App. 483, 484, 337 S.E.2d 162, 163 (1985).

42. *Waste Management, Inc. v. Peerless Ins. Co.*, 315 N.C. 688, 694, 340 S.E.2d 374, 379 (1986). "No ambiguity . . . exists unless, in the opinion of the court, the language of the policy is fairly and reasonably susceptible to either of the constructions for which the parties contend." *Id.* (quoting *Wachovia Bank & Trust Co. v. Westchester Fire Ins. Co.*, 276 N.C. 348, 354, 172 S.E.2d 518, 522 (1970)).

43. *See, e.g.*, *Graham*, 84 N.C. App. at 430-31, 352 S.E.2d at 881 (insurer liable for coverage when policy insured against injury resulting from assault but excluded claims arising out of any criminal act); *Southeast Airmotive Corp. v. United States Fire Ins. Co.*, 78 N.C. App. 418, 418-20, 337 S.E.2d 167, 168-69 (1985) (insurer liable for coverage when policy covered damage to property arising from use of aircraft but excluded damage to property carried on an aircraft), *disc. rev. denied*, 316 N.C. 196, 341 S.E.2d 583 (1986); *Stanback v. Westchester Fire Ins. Co.*, 68 N.C. App. 107, 111-15, 314 S.E.2d 775, 778-80 (1984) (insurer liable for coverage when policy covered personal injury, including false arrest and false imprisonment, but excluded acts "committed . . . with intent to cause personal injury").

44. *See infra* notes 46-61 and accompanying text.

45. *See supra* note 43.

46. 271 N.C. 158, 155 S.E.2d 501 (1967).

47. *Id.* at 159-61, 163, 155 S.E.2d at 503-04.

an intentional act, the clearing of adjacent property did not constitute intentional destruction for the purposes of the policy exemption.<sup>48</sup> Similarly, the court in *W & J Rives, Inc. v. Kemper Insurance Group*<sup>49</sup> construed ambiguous policy language in favor of the insured. In that case, Rives, a manufacturer of sportswear, had contracted with Aetna Casualty and Insurance Company for an excess umbrella policy.<sup>50</sup> The Aetna policy contained an exemption for property damage "to the extent that the insured has agreed to provide [other] insurance therefor."<sup>51</sup> When a shipment of Rives' goods was stolen in 1984, the company claimed against Aetna for the value of loss in excess of that covered by its primary insurer, Kemper Insurance Group.<sup>52</sup> Aetna denied coverage, asserting that since Rives had reached an agreement with Kemper to insure the shipment, Aetna's policy did not apply.<sup>53</sup> The court, noting that Aetna's agent had issued the policy pursuant to Rives' request for excess coverage for precisely the type of shipments involved, ruled that Rives' policy with Aetna covered the uninsured losses.<sup>54</sup> The exemption clause, the court held, applied only to agreements with third parties such as purchasers of Rives' goods, and not to agreements with other insurance companies.<sup>55</sup>

North Carolina courts, however, have by no means accepted assertions of ambiguity in insurance policies whenever parties have so pleaded. Accordingly, in *Western World Insurance Co. v. Carrington*,<sup>56</sup> the court rejected arguments by a waterproofing contractor that his general liability policy covered damages in a suit for the costs of remediating faulty workmanship.<sup>57</sup> The court held that the policy's exclusion for "property damage to work performed by . . . the named insured arising out of the work"<sup>58</sup> effectively excused the insurer, since the claim consisted "solely for bringing the quality of the insured's work up to the standard bargained for."<sup>59</sup> Similarly, the court of appeals in *Wilkins v. American Motorists Insurance Co.*<sup>60</sup> held that claims of failure to warn or properly instruct persons leasing an aircraft from the insured fell within a homeowner's policy exclusion for injuries "arising out of the ownership, maintenance [or] use . . . of . . . an aircraft."<sup>61</sup>

As these cases suggest, the ability to determine whether ambiguity exists has afforded courts considerable flexibility in determining the precise extent to

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48. *Id.* at 163, 155 S.E.2d at 505-06.

49. 92 N.C. App. 313, 374 S.E.2d 430 (1988), *disc. rev. denied*, 324 N.C. 342, 378 S.E.2d 809 (1989).

50. *Id.* at 315, 374 S.E.2d at 432.

51. *Id.* at 316, 374 S.E.2d at 432.

52. *Id.* at 315, 374 S.E.2d at 432.

53. *Id.* at 315-16, 374 S.E.2d at 432.

54. *Id.* at 316-17, 374 S.E.2d at 433.

55. *Id.* at 317, 374 S.E.2d at 433.

56. 90 N.C. App. 520, 369 S.E.2d 128 (1988).

57. *Id.* at 521, 524, 369 S.E.2d at 128-29.

58. *Id.* at 522, 369 S.E.2d at 129.

59. *Id.* at 525, 369 S.E.2d at 131.

60. 97 N.C. App. 266, 388 S.E.2d 191 (1990). The opinion was handed down after *Duke University*.

61. *Id.* at 268, 272, 388 S.E.2d at 193, 195.



which policies of insurance protect policyholders. This flexibility, however, is limited by the principle that even ambiguous terms must be construed in harmony with the express provisions of the policy and the intent of the parties.<sup>62</sup> Most frequently, this maxim is expressed as a refusal, "under the guise of interpreting an ambiguous provision, [to] remake the contract and impose liability upon the company which it did not assume and for which the policyholder did not pay."<sup>63</sup> Occasionally, however, North Carolina courts have articulated this principle in terms of the intent of the parties as discernable through the contract. As one court wrote: "[T]he objective of construction of terms in an insurance policy is to arrive at the insurance coverage intended by the parties when the policy was issued."<sup>64</sup>

The best illustration of this intent-oriented reasoning is the North Carolina Supreme Court's holding in *Waste Management, Inc. v. Peerless Insurance Co.*<sup>65</sup> In that case, a private trash collection company accused of depositing refuse containing hazardous materials in a local landfill sought to compel its insurers to defend the action.<sup>66</sup> The insurers argued that a policy exclusion for pollution damage exempted the underlying suit,<sup>67</sup> which involved deposits over a six-year

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62. *Wachovia Bank & Trust Co. v. Westchester Fire Ins. Co.*, 276 N.C. 348, 354-55, 172 S.E.2d 518, 522 (1970).

63. *E.g.*, *Waste Management, Inc. v. Peerless Ins. Co.*, 315 N.C. 688, 694, 340 S.E.2d 374, 379 (1986) (quoting *Wachovia*, 276 N.C. at 354, 172 S.E.2d at 522).

64. *Wachovia*, 276 N.C. at 354, 172 S.E.2d at 522. The *Wachovia* court went on to enumerate a series of rules of construction to be used in gleanings the intent of the parties from the language of the insurance contract:

When the policy contains a definition of a term used in it, this is the meaning which must be given to that term wherever it appears in the policy, unless the context clearly requires otherwise. In the absence of such definition, nontechnical words are to be given a meaning consistent with the sense in which they are used in ordinary speech, unless the context clearly requires otherwise. . . .

Where the immediate context in which words are used is not clearly indicative of the meaning intended, resort may be had to other portions of the policy and all clauses of it are to be construed, if possible, so as to bring them into harmony. Each word is deemed to have been put into the policy for a purpose and will be given effect, if that can be done by any reasonable construction in accordance with the foregoing principles.

*Id.* at 354-55, 172 S.E.2d at 522 (citations omitted).

Interestingly, the clearest expression of the importance of intent is found in the opinions of courts that originally struggled with the theoretical justification of construing a policy against the insurer. In *Bray v. Virginia Fire & Marine Ins. Co.*, 139 N.C. 390, 51 S.E. 922 (1905), for example, the court wrote:

If the clause in question is ambiguously worded, so that there is any uncertainty as to its right interpretation, or if for any reason there is doubt in our minds concerning its true meaning, we should construe it rather against the [insurer] . . . giving, of course, legal effect to the intention, if it can be ascertained, although it may have been imperfectly or obscurely expressed.

*Id.* at 393, 51 S.E. at 923 (emphasis added).

65. 315 N.C. 688, 340 S.E.2d 374 (1986).

66. *Id.* at 689-90, 340 S.E.2d at 376-77.

67. *Id.* at 690, 340 S.E.2d at 376-77. The exact language of the policy was as follows:

This insurance does not apply . . . to bodily injury or property damage arising out of the discharge, dispersal, release or escape of . . . toxic chemicals . . . waste materials or other . . . contaminants or pollutants into or upon land, the atmosphere or any water course or body of water; but this exclusion does not apply if such discharge, dispersal, release or escape is sudden and accidental.

*Id.* at 693-94, 340 S.E.2d at 379.

period, unless such damage resulted from a "sudden and accidental" release of harmful materials.<sup>68</sup> In holding that the exclusion applied, the court looked not only to the language of the insurance contract, but also to the underlying policy reasons for the pollution exclusion.<sup>69</sup> In particular, the court noted that, from the insured's perspective, coverage for pollution damage would result in a temptation to "diminish . . . precautions and relax . . . vigilance."<sup>70</sup> Conversely, wrote the court, by "putting the financial responsibility for pollution that may occur over the course of time upon the insured [, the policy] places the responsibility to guard against such occurrences upon the party with the most control over the circumstances most likely to cause the pollution."<sup>71</sup> The court also noted in a footnote that at the time the policyholder purchased the insurance in question, separate policies for "environmental impairment" were available to supplement general liability coverage.<sup>72</sup> The existence of pollution coverage, the court opined, was "enlightening concerning the underwriters' understanding of the scope of coverage in the [general] liability policy."<sup>73</sup> These types of policy-based observations, though relatively rare in North Carolina insurance jurisprudence, indicate the court's willingness to look beyond the mechanical application of traditional rules of construction to more subtle indications regarding the intent of parties and the meaning of policy language.

Compared to the large amount of North Carolina case law addressing construction of insurance policies, authority regarding the nature of the term "professional services" is quite limited.<sup>74</sup> Indeed, the court in *Duke University* found

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68. See *id.* at 690, 696-700, 340 S.E.2d at 376, 380-83. The insurers also argued that the routine dumping of waste materials alleged in the underlying suit was not an "occurrence" for the purposes of the policies involved. *Id.* at 695-96, 340 S.E.2d at 379-80. The court disagreed. *Id.* at 696, 340 S.E.2d at 380.

69. See *id.* at 697-98, 340 S.E.2d at 381.

70. *Id.* at 698, 340 S.E.2d at 381.

71. *Id.* The full language of the court's observation is as follows:

The policy reasons for the pollution exclusion are obvious: if an insured knows that liability incurred by all manner of negligence or careless spills and releases is covered by his liability policy, he is tempted to diminish his precautions and relax his vigilance. Relaxed vigilance is even more likely where the insured knows that the intentional deposit of toxic material in his dumpsters, so long as it is unexpected, affords him coverage. In this case, it pays the insured to keep his head in the sand.

From the insurer's perspective, the practical reasons for the pollution exclusion are likewise clear: the lessons of Love Canal and sites like it have revealed the yawning extent of potential liability arising from the gradual or repeated discharge of hazardous substances into the environment. In addition, putting the financial responsibility for pollution that may occur over the course of time upon the insured places the responsibility to guard against such occurrences upon the party with the most control over the circumstances most likely to cause the pollution.

*Id.* at 697-98, 340 S.E.2d at 381.

72. *Id.* at 698 n.5, 340 S.E.2d at 381 n.5.

73. *Id.*

74. Although a number of North Carolina statutes use the term "professional service," few have resulted in litigation specifically addressing the term. The few cases that have addressed the term provide little guidance for the purposes of this analysis. Two courts have refused to find the term unconstitutionally vague. In *State v. Covington*, 34 N.C. App. 457, 238 S.E.2d 794 (1977), *disc. rev. denied*, 294 N.C. 184, 241 S.E.2d 519 (1978), the court concluded that a statute defining the "practice of professional engineering" as "any professional service . . . requiring engineering education . . . and the application of special knowledge of the mathematical, physical and engineering sciences," N.C. GEN. STAT. § 89-2(6) (1965) (current version at N.C. GEN. STAT. § 89C-3(6))

its definitional authority for the term in *Smith v. Keator*,<sup>75</sup> a case wholly unrelated to insurance law. In *Smith* a group of masseurs operating in Fayetteville sought to avoid local licensing requirements by arguing that state law gave the North Carolina Commissioner of Revenue sole authority to license practitioners of any "professional art of healing."<sup>76</sup> The court held that masseurs could not be classified as professionals.<sup>77</sup> A professional service, it wrote, "is one arising out of a vocation, calling, occupation, or employment involving specialized knowledge, labor, or skill, and the labor of [sic] skill involved is predominantly mental or intellectual, rather than physical or manual."<sup>78</sup> This definition is substantially identical to that reported by Appleman,<sup>79</sup> who notes further that "[m]ere employment, even though on a compensated basis, does not of itself render the person employed a 'professional' in that particular field."<sup>80</sup>

North Carolina law has been the basis for two holdings regarding the nature of professional services for the purposes of malpractice insurance. In *Mastrom, Inc. v. Continental Casualty Co.*,<sup>81</sup> an accounting firm that had recommended investment in one of its financially troubled clients sought coverage for its liability in fraud.<sup>82</sup> The court held that investment advising could not be brought within the firm's coverage for "damages . . . arising out of the per-

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(1989)), was not unconstitutionally vague as applied to an engineer accused of practicing engineering without registering as required by statute. *Covington*, 34 N.C. App. at 460-61, 238 S.E.2d at 797. In *Roberts v. Durham County Hosp. Corp.*, 56 N.C. App. 533, 289 S.E.2d 875 (1982), *aff'd per curiam*, 307 N.C. 465, 298 S.E.2d 384 (1983), a statute establishing a period of limitations for "malpractice arising out of the performance of or failure to perform professional services," N.C. GEN. STAT. § 1-15(c) (1983), was held not to be unconstitutionally vague as applied to a doctor who failed to remove an intravenous catheter after rendering care. *Roberts*, 56 N.C. App. at 538-41, 289 S.E.2d at 878-80.

Two cases involving North Carolina's unfair and deceptive trade practice statute, N.C. GEN. STAT. § 75-1.1 (1988), have interpreted a professional services exemption in that law rather broadly. In *Cameron v. New Hanover Memorial Hosp., Inc.*, 58 N.C. App. 414, 293 S.E.2d 901, *disc. rev. denied*, 307 N.C. 127, 297 S.E.2d 399 (1982), the court held that the statute's exemption for "professional services rendered by a member of a learned profession," N.C. GEN. STAT. § 75-1.1(b), exempted doctors who, as members of a hospital administrative board, voted to deny staff privileges to a podiatrist. *Cameron*, 58 N.C. App. at 446-47, 293 S.E.2d at 920-21. The court concluded that "the nature of this consideration of whom to grant hospital staff privileges is a necessary assurance of good health care; certainly, this is the rendering of 'professional services.'" *Id.* at 447, 293 S.E.2d at 921. Similarly, the court held in *Abram v. Charter Medical Corp.*, 100 N.C. App. 718, 398 S.E.2d 331 (1990), that a drug rehabilitation services provider who requested a review of a competitor's certificate-of-need application was acting as a responsible provider of professional services and thus outside the scope of the statute. *Id.* at 722, 398 S.E.2d at 334. *But cf.* *Winston Realty Co. v. G.H.G., Inc.*, 70 N.C. App. 374, 375-76, 382, 320 S.E.2d 286, 287-88, 291 (1984) (employment agent who recommended convicted embezzler for accounting position was not rendering professional services for purposes of professional services exemption in unfair and deceptive trade practices statute), *aff'd*, 314 N.C. 90, 331 S.E.2d 677 (1985).

75. 21 N.C. App. 102, 203 S.E.2d 411, *aff'd*, 285 N.C. 530, 206 S.E.2d 203, *appeal dismissed*, 419 U.S. 1043 (1974).

76. *Id.* at 103, 105, 203 S.E.2d at 413, 415; *see* N.C. GEN. STAT. § 105-41(a) (1989) (amended 1990).

77. *Smith*, 21 N.C. App. at 105-06, 203 S.E.2d at 415.

78. *Id.* (quoting *Marx v. Hartford Accident & Indem. Co.*, 183 Neb. 12, 14, 157 N.W.2d 870, 872 (1968)).

79. 7A J. APPLEMAN, *INSURANCE LAW AND PRACTICE* § 4504.01, at 309-10 (W. Berdal ed. 1979).

80. *Id.* § 4501.12 at 282-83.

81. 78 N.C. App. 483, 337 S.E.2d 162 (1985).

82. *Id.* at 483-84, 337 S.E.2d at 163.

formance of professional services . . . as an accountant.”<sup>83</sup> Similarly, in *Smith v. Travelers Indemnity Co.*,<sup>84</sup> a federal district court found that an attorney’s professional malpractice policy did not cover his failure to return \$15,000 given to him for investment.<sup>85</sup> Noting that no attorney-client relationship had been established at the time the lawyer received the money, the court concluded that the plaintiff had not employed the attorney “for the purposes of obtaining any legal assistance.”<sup>86</sup> The transaction, therefore, was outside the coverage of the malpractice policy.<sup>87</sup>

The second element of the *Duke University* court’s definition of professional services—the rule that the nature of the act rather than the title or character of the actor should determine the presence of such services—is new to North Carolina law. While at least three other jurisdictions have applied this rule,<sup>88</sup> each has done so in a largely mechanical fashion, with no discussion of underlying rationale or purpose.<sup>89</sup>

Fundamental to an understanding of the holding in *Duke University* is a careful analysis of the types of activities that the term “professional services” may encompass. Relevant activities can be grouped into two categories. First are services that even the narrowest definition of the term will embrace. These are acts informed by special knowledge.<sup>90</sup> Examples include a surgeon’s selection of an incision site, a lawyer’s drafting of a will, and an accountant’s classification of expenses for bookkeeping purposes. The second, much broader, category of services consists of those actions that, though not arising directly from some specially informed judgment, are associated so closely with the per-

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83. *Id.* at 484-85, 337 S.E.2d at 163. The court concluded: “Nowhere do we find any definition of ‘accountant’ broad enough to include the sale of securities, nor any definition of ‘accountant’ as one who offers a general range of financial services.” *Id.* at 485, 337 S.E.2d at 164.

84. 343 F. Supp. 605 (M.D.N.C. 1972).

85. *Id.* at 605-06, 610.

86. *Id.* at 609.

87. *Id.* at 609-10. The terms of the professional malpractice at issue involved provided for insurance for claims “arising out of the performance of professional services for others in the insured’s capacity as a lawyer.” *Id.* at 608.

88. See *Mason v. Liberty Mut. Ins. Co.*, 370 F.2d 925, 926 (5th Cir. 1967) (per curiam) (court applying Louisiana law held that claim by infirm patient for injuries received from hypodermic injection administered by student nurse was within professional services exclusion of general liability policy); *Danks v. Maher*, 177 So. 2d 412, 417-18 (La. App. 1965) (claim by patient injured when hospital nurse failed to count accurately laparotomy sponges removed from patient undergoing abdominal surgery was not within professional services exclusion of hospital’s general liability policy); *D’Antoni v. Sara Mayo Hosp.*, 144 So. 2d 643, 646-47 (La. App. 1962) (claim by patient injured in fall from bed after hospital attendants failed to raise bed rails was not within professional services exclusion of hospital’s general liability policy); *Marx v. Hartford Accident & Indem. Co.*, 183 Neb. 12, 14, 157 N.W.2d 870, 872 (1968) (when fire resulted from laboratory technician’s refilling steam sterilizer with benzene, court concluded that damages were not excluded by a general liability policy exclusion for the rendering of professional services); *Multnomah County v. Oregon Auto. Ins. Co.*, 256 Or. 24, 28-29, 470 P.2d 147, 150 (1970) (inmate’s claim of failure to provide necessary medical treatment against county jailer within professional services exclusion of general liability policy).

89. See *supra* note 88. Appelman reports the rule without comment. 7A J. APPLEMAN, *supra* note 79, § 4504.01, at 310 (“[I]n determining whether a particular act is a ‘professional service’ the court must look not to the title or character of the party performing the act, but to the act itself.”).

90. See *Duke University*, 96 N.C. App. at 639, 386 S.E.2d at 765. Although the definition of professional services used in the principal case is more complex and precise, see *id.*, this Note uses the phrase, “informed by special knowledge” or phrases similar thereto, as shorthand for the concept.

formance of informed services that they are arguably professional in character. Activities within this second category can be ordered according to the strength of their association with acts in the first category. For example, when a surgeon fails to remove an instrument from a patient before closure, the mechanical act of inventorying instruments or recognizing that one has been left in the patient requires no special skill or knowledge, yet it seems likely that even the most conservative of courts would classify such an action as a failure to render a professional service. On the opposite end of the spectrum are actions that are only loosely associated with the furnishing of a service requiring special skill or knowledge. Maintenance of a doctor's office premises, for example, may well constitute an action so remote from the application of specialized knowledge as to render meaningless any assertion that it is professional in character.

In interpreting professional service exclusion clauses, there is a temptation to assert that only those activities classified within the first category above—actions informed by some special skill or knowledge—should be deemed to fall within the exclusion language. Indeed, this is one possible interpretation of the holding in *Duke University*. Specifically, the court observed that stabilizing the dialysis chair and assisting the patient did “not require any special skills or training.”<sup>91</sup> In its strictest sense, this statement would exclude almost any act not informed by some special knowledge or skill.

Most likely, however, the *Duke University* court concluded only that the acts and omissions at issue in the case could not be classified without ambiguity. This determination, in turn, required a decision in favor of the insured, since the applicable rules of construction demand that any ambiguity be resolved against the insurer. This interpretation of the holding is supported by the court's observation that “the claim in this case could come within [a professional liability policy] and yet not fall within a professional services exclusion.”<sup>92</sup> Indeed, this notion that a single claim may be susceptible to coverage under both general and professional liability policies suggests that the court tacitly recognized that certain professional services may be classified along a spectrum according to the strength of their association with actions which are truly informed by special skill and knowledge.

While both the above modes of analysis achieve results commensurate with North Carolina insurance jurisprudence, there is little to recommend either. If professional services are restricted exclusively to actions informed by special knowledge, general liability insurance will cover a whole range of activities closely associated with informed actions, but not themselves requiring special knowledge, regardless of the applicable policy's exclusionary language. While the opinion in *Duke University* does not require this result, its largely mechanical analysis does little to dissuade future courts from this interpretation.

The second interpretation of the court's holding also presents important difficulties. By its express terms, the opinion institutionalizes an overlap between general liability policies, the exclusionary clauses of which must be con-

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91. *Id.* at 641, 386 S.E.2d at 766.

92. *Id.* at 640, 386 S.E.2d at 765.

strued narrowly, and professional services liability policies, which must be construed broadly.<sup>93</sup> This overlap is likely to encourage litigation between competing insurers as they attempt to apportion liability with regard to actions that are covered under two policies. Policyholders, in contrast, will be encouraged to use any overlap in experience-rated policies to file claims under less expensive general liability policies, thus shifting the cost of insuring the particular activity away from populations most able to limit the risk involved. Finally, the overlap will hamper efforts by insurance providers to classify activities according to the nature of the risk involved and to set premiums accordingly.

The court in *Duke University* could have reduced the potential overlap between general liability and professional services policies by broadening its analysis to consider the intent of the parties and the underlying theory of the policy provisions at issue as a means of reducing ambiguity in the term "professional services." In particular, the court failed to note that most insurance companies attempt to maximize profitability by grouping policyholders into categories that share common risks.<sup>94</sup> Classification allows insurers to measure accurately the costs of insuring risks and to price policies, copayments, and deductibles in a manner that maximizes both risk avoidance and risk protection.<sup>95</sup> Furthermore, accurate classification serves important societal interests by placing the burden of insuring a risk on those persons most able to protect against it.<sup>96</sup>

As suggested earlier, judicial consideration of these principles of risk allocation and insurance economics is not without precedent. In *Waste Management, Inc. v. Peerless Insurance Co.*<sup>97</sup> the North Carolina Supreme Court, looking to what it termed "policy reasons,"<sup>98</sup> gave considerable weight to the fact that the pollution exclusion at issue encouraged policyholders to "guard against" the pollution risk.<sup>99</sup> The *Waste Management* court noted that the exclusion was entirely consistent with the insurer's perception of the "yawning extent" of the potential liability involved<sup>100</sup> and the availability of special forms of insurance to

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93. See *id.*

94. K. ABRAHAM, *DISTRIBUTING RISK: INSURANCE, LEGAL THEORY, AND PUBLIC POLICY* 15 (1986).

95. *Id.*

96. *Id.* at 138. Of course, insurance may serve a distributional function as well. The whole point of insurance is to enable a single individual to avoid the entire risk for a particular activity. See *id.* at 18. In virtually all cases, insurers' inability to predict risk for particular individuals perfectly, combined with the cost of information gathering, prevents classification of insureds into groups so small that the distributive benefit of insurance is lost. *Id.* at 15.

Some commentators have suggested that an appropriate function of insurance law is to assure that risk classification by insurers does not inappropriately limit the socially desirable goal of risk distribution. See *id.* at 18-31. A discussion of the appropriateness of judicial interpretation of private contracts of insurance for risk distribution purposes is beyond the scope of this Note. It should be noted, however, that the court in *Duke University* made no express or implied reference to this objective. Further, while the ever increasing cost of health care insurance may provide an argument that broader risk distribution is appropriate for professional services in the field of health care, the policy adopted by the court in *Duke University* would appear to apply to *all* forms of professional service, inside and outside the health care arena. See *infra* notes 103-06 and accompanying text.

97. 315 N.C. 688, 340 S.E.2d 374 (1986).

98. *Id.* at 697, 340 S.E.2d at 381.

99. *Id.* at 697-98, 340 S.E.2d at 381.

100. *Id.* at 698, 340 S.E.2d at 381.

cover the specific risk.<sup>101</sup>

Similar arguments can be made regarding professional services coverage. Specifically, when a particular action is related closely to some action informed by special skill or knowledge, the risks associated with the action are likely to be peculiarly within the control of the actor in his capacity as a professional. Under the theory that the costs of insuring risks should be borne by those most able to control the risk, such actions should be insured under professional services insurance policies rather than under contracts of general liability insurance. Alternatively, when a particular action is only loosely associated with the rendering of some specially informed service or skill, the risks associated with the action are more likely to be within the control of the actor as a member of society in general. In other words, the risks associated with the action are *not* disproportionately within the actor's control in his capacity as a professional. Such acts are, therefore, most appropriately insured under general liability coverage.

Notably, this mode of analysis is consistent with the rule that the nature of an act and not the title or position of the actor is determinative with respect to the presence of professional services. Looking to the title of an actor gives no indication of whether the particular action at issue is peculiarly within her control as a professional. To build on an example already suggested, a doctor's liability for failure to maintain safe premises is not closely related to the medical profession, but rises from a duty common to owners of business premises as a whole. The risk and liability are not closely related to the doctor's skill or learning, nor disproportionately within her control as a professional.

Applying the suggested analysis to the facts in *Duke University*, it is clear that the court, though failing to recognize the intent of the parties as a factor in construing the policy at issue, ultimately arrived at a result consistent with such an analysis. As the court intuitively concluded, the failure to fix the casters on the patient's dialysis chair was not an omission uniquely or disproportionately associated with the providing of skilled health care. The court suggested in its closing analysis:

Although the dialysis chair was a specialized piece of equipment, the injury was not related to any special function of the chair but merely resulted from the presence of casters on the chair which enable it to be easily moved. The injury may have been avoided by simply locking the casters or holding the chair.<sup>102</sup>

As this statement suggests, much the same risk is found in the failure of any business operator to safely use and maintain equipment on his premises. In this light, the failure to lock the casters was not an action informed by special knowledge, nor so closely related to the employment of specially informed judgment as to be disproportionately associated with the provision of health care.

Finally, although *Duke University* presents the problem of analyzing professional liability exclusions in terms of the health care profession, the question is

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101. *Id.* at 698 n.5, 340 S.E.2d at 381 n.5.

102. *Duke University*, 96 N.C. App. at 641, 386 S.E.2d at 766.

by no means unique to that field. Cases in other jurisdictions have addressed the problem in the context of engineering firms,<sup>103</sup> barbers and beauticians,<sup>104</sup> and hotel operations.<sup>105</sup> One innovative insurer has even suggested that a professional services exclusion apply to babysitting in the home.<sup>106</sup> Indeed, the problem is likely to arise in any professional area in which insurance companies offer or limit protection for professional liability.

Although the mode of analysis suggested by this Note may be applied to any of these fields, the classification scheme it proposes certainly is not without ambiguity. Close cases will continue to pose difficult choices. But consideration of the economic and risk allocation objectives of policy exclusions, and in particular the need to place the cost of insurance on those most able to prevent the injury insured, would provide a useful guidepost for jurists. Further, such considerations would serve as an appropriate balance to the well-established goal of protecting the insured against unfair and ambiguous policy language.

North Carolina has joined other jurisdictions in holding that courts should resolve ambiguities in contracts of insurance in favor of the insured.<sup>107</sup> This canon of construction, which opinions of early courts grounded solidly in the need to protect policyholders from the "slippery" wording of complex and technical contracts, is now a fixture of modern insurance jurisprudence. Yet, in many respects, contemporary application of the rule has become largely mechanical. Such was the case in *Duke University*, where the North Carolina Court of Appeals narrowly construed a general liability policy exclusion for professional services. While the *Duke University* court's result arguably is correct, the opinion fails to articulate a rationale that will guide future courts in resolving similar disputes over the status of professional services exclusion claims. Further, by openly acknowledging that current rules of construction create an area of overlap between general liability and professional services coverages, the

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103. See, e.g., *First Ins. Co. v. Continental Casualty Co.*, 466 F.2d 807 (9th Cir. 1972) (engineering drawings requiring earthen fill which damaged oil pipeline constituted failure of professional services for purposes of contractor's general liability policy exclusion); *Womack v. Travelers Ins. Co.*, 251 So. 2d 463 (La. App. 1971) (engineering firm's failure to confirm drawings showing location of gas pipeline was professional malpractice within general liability policy exclusion); *Atlantic Mut. Ins. Co. v. Continental Nat'l Am. Ins. Co.*, 123 N.J. Super. 241, 302 A.2d 177 (1973) (failure of engineering firm to properly oversee trench fortification was failure to render professional services excluded by general liability policy).

104. See, e.g., *Ocean Accident & Guarantee Corp. v. Herzberg's Inc.*, 100 F.2d 171 (8th Cir.) (beautician's negligent use of electrical depilator was failure of professional services for purposes of exclusion in department store's general liability policy), *cert. denied*, 306 U.S. 645 (1939); *Ruotolo v. Aetna Casualty & Sur. Co.*, 56 Misc. 2d 45, 287 N.Y.S.2d 622 (1968) (barber who hit customer in eye with whisk broom not rendering tonsorial services for purposes of exclusion in general liability policy); *Lady Beautiful, Inc. v. Zurich Ins. Co.*, 16 Ohio Misc. 169, 240 N.E.2d 894 (1968) (beauty parlor patron's injuries from faulty hair dryer not a result of acts or omissions excluded by professional services clause of general liability policy).

105. See *Maryland Casualty Co. v. Crazy Water Co.*, 160 S.W.2d 102 (Tex. Civ. App. 1942) (hotel patron's injuries in bath prescribed by hotel physician and attended by hotel "tubber" (one who draws the bathwater, checks the water temperature, and otherwise assists a bather) not excluded by professional services clause of general liability policy).

106. See *Gulf Ins. Co. v. Tilley*, 280 F. Supp. 60 (N.D. Ind. 1967), *aff'd per curiam*, 393 F.2d 119 (7th Cir. 1968).

107. See *Grabbs v. Farmers' Mut. Fire Ins. Ass'n*, 125 N.C. 389, 34 S.E. 503 (1899); *supra* text accompanying note 1.



opinion encourages future litigation and impedes insurers' abilities to classify and price insurance policies covering risks related to professional services accurately. These difficulties will continue until North Carolina courts begin to consider systematically the underlying nature of insurance contracts and the importance of accurate risk allocation in interpreting and coordinating the insurance of professional services.

SAMUEL M. TAYLOR